

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,) 2:08-cr-140-KJD-GWF
Plaintiff,) 2:08-cr-141-KJD-GWF
vs.) 2:08-cr-163-JCM-GWF
CHRISTOPHER SANGALANG, *et al.*,)
Defendants.)

REPORT &
RECOMMENDATIONS

Motions to Dismiss

This matter is before the Court on Defendants Sangalang's and Patton's Motion to Dismiss Based on Outrageous Government Conduct¹ (140:67) (141:65)(163:104); the Government's Opposition to Defendants' Motion to Dismiss Indictment Based Upon Alleged Outrageous Government Conduct (140:91)(163:175); Defendant Patton's Supplement to Motion to Dismiss Based on Outrageous Government Conduct (140:102)(163:207); Defendants Sangalang's and Patton's Reply to Post-Evidentiary Hearing Brief (140:196) (141:97) (163:378) (160:384). The Court conducted hearings on October 2, 2008; November 20, 2008; December 19, 2008; December 30, 2008; January 5, 2009; January 6, 2009; January 27, 2009; February 20, 2009; March 26, 2009; April 30, 2009; May 6, 2009; May 11, 2009; May 12, 2009; June 24, 2009; and August 7, 2009.

FACTUAL BACKGROUND

This motion concerns the indictments in the following cases: In Case No. 2:08-cr-140-KJD-GWF, Defendants Christopher Sangalang and Deandre Patton are charged with a

¹For purposes of reference, citations to motions and other pleadings are listed by the last three digits of the case number in which the document is filed with the corresponding docket entry in that case, i.e. (140:67) (141:65) (163:104).

conspiracy to distribute methamphetamine between November 1, 2007 and March 25, 2008. Defendants are also charged with distribution of controlled substances and aiding and abetting on February 25, 2008, March 25, 2008 and March 27, 2008 and with unlawful possession of a short-barreled shotgun, short-barrel rifles, and firearms with obliterated serial numbers and aiding and abetting on December 13 and 14, 2007. In Case No. 2:08-cr-141-KJD-GWF, Defendant Sangalang is charged with the unlawful possession of an unregistered machine gun on or about January 6, 2008.

In Case No. 2:08-cr-163-JCM-GWF, Defendants Sangalang, Patton, Alfredo Flores, Roderick Jones², Robert Williams and Derek Jones are charged with conspiracy to interfere with commerce by robbery pursuant to the Hobbes Act, 18 U.S.C. § 1951(a). This conspiracy allegedly took place between April 15, 2008 and May 15, 2008. Defendants are also charged with conspiracy to possess with intent to distribute cocaine and with possession of a firearm in furtherance of a drug trafficking crime which also took place between April 15, 2008 and May 15, 2008.

1. Background of the Undercover Operation

The indictments in these cases arise from an undercover sting operation conducted by agents of the Bureau of Alcohol, Tobacco and Firearms (ATF). The undercover operation, which was code named “Sin City Ink” or “Sin City Treace,” was conducted at a tattoo parlor, “Hustler’s Tattoo,” which the ATF opened and outfitted with video and audio equipment. The two principal ATF agents involved in the undercover operation, Peter McCarthy and Mark Gomez, testified during the evidentiary hearing. Video and audio recordings of meetings between the undercover agents and the Defendants were also admitted into evidence.

The undercover operation began in February 2007 with the intention of targeting violent criminals and street gang members operating in the Las Vegas area. The operation arose from Agent Gomez's contact with an individual named Jaime Pedrasa, aka "Fat Cat," who had come

²Defendant Roderick Jones has pled guilty to Count I of the indictment and has been sentenced to a term of imprisonment.

1 to the ATF's attention because he purchased multiple firearms. Agent Gomez discovered that
2 Mr. Pedrasa was a tattoo artist and the agent observed a lot of gang members or "criminal
3 element" in the tattoo shop where Pedrasa worked. Pedrasa agreed to work as a paid informant
4 for the ATF. Mr. Pedrasa introduced Agent Gomez to another tattoo artist, Richard Beckworth,
5 aka "Bones," who also agreed to serve as a paid informant. As a result of Agent Gomez's
6 observations and contacts with Pedrasa and Beckworth, the ATF decided to open Hustler's
7 Tattoo.

8 Agent McCarthy has been employed as an ATF agent since 1991 and previously
9 infiltrated a motorcycle gang and the Aryan Brotherhood. During the Sin City Ink operation, he
10 played the role of the owner of the tattoo parlor and the head of the illegal weapons and narcotics
11 operation. Agent Gomez, who was closer in age to most of the targets, played the role of
12 McCarthy's assistant or "right hand man." Once Hustler's Tattoo opened in September 2007, the
13 undercover agents put the word out through the informants that they were interested in
14 purchasing illegal firearms and narcotics. Mr. Pedrasa and Mr. Beckworth worked as tattoo
15 artists in the shop and arranged firearms and drug deals between targets and the undercover
16 agents. Agent Gomez brought the targets into the tattoo parlor office to meet with Agent
17 McCarthy who would then consummate the firearms or narcotics purchases. The transactions
18 were recorded on audio/video equipment.

19 Agent Gomez testified that the undercover agents would generally go into the tattoo
20 parlor about 6:00 p.m. and hang out until early morning to make contact with gang members and
21 set up purchases of guns and narcotics. He described Hustler's Tattoo as a "clubhouse for the
22 members of the Twenty-Eighth Street gang and their associates." *12/19/08 Hearing Transcript,*
23 *Docket No. 224, page 106*³. The gang members or associates who hung out in the shop regularly
24 smoked marijuana on the premises. Agents McCarthy and Gomez also testified that the
25 informant Richard Beckworth smoked marijuana on several occasions in the tattoo parlor which
26 was a violation of his informant's agreement. The agents counseled Mr. Beckworth not to use
27

28 ³The transcript docket references are to Case No. 2:08-cr-163-JCM-GWF.

1 marijuana, but he continued to violate his agreement. Mr. Beckworth's drug use was reported to
 2 ATF management and the decision was made to continue using him as an informant. *01/05/09*
 3 *Hearing Transcript, Docket No. 233, pages 50-57.*

4 Agent McCarthy testified that as part of his role-playing or "street theater," he used an
 5 "unwitting informant" to purchase a glass smoking pipe from a head shop. He used this pipe to
 6 smoke a legal herbal substance known as "Wizard Weed" which has an odor substantially similar
 7 to that of burning marijuana. Agent McCarthy testified that he simulated the use of marijuana for
 8 two reasons. First, he wanted to indicate to targets that he was engaged in criminal activity and
 9 thereby gain credibility with them and overcome their suspicions. Second, by feigning the use of
 10 marijuana, he would be able to avoid the targets' offers to use other drugs, such as a
 11 methamphetamine, without arousing their suspicions. *12/19/08 Hearing Transcript, Docket No.*
 12 224, pages 108-109. Defendants contend, however, that Agent McCarthy actually used
 13 marijuana or some other illegal controlled substance during the undercover operation.

14 **2. Initial Meeting Between Agents and Defendants Sangalang and Patton**

15 Agent McCarthy and Agent Gomez met Defendants Christopher Sangalang and Deandre
 16 Patton on November 1, 2007 as a result of "street theater" that the agents engaged in to make the
 17 targets believe they were criminals. Agent McCarthy testified that the agents told Paul Ashley,
 18 who is charged in another indictment arising out of the operation, that they were having problems
 19 at a local bar and wanted to hire some of his gang members to "just go with us to this bar, to be
 20 seen with us at the bar, and to intimidate people in the bar that we were having trouble with."
 21 *12/19/08 Hearing Transcript, Docket No. 224, page 113.* Mr. Ashley, Mr. Sangalang, Mr.
 22 Patton, Mr. Beckworth, and two other individuals showed up at the bar -- "Mr. D's." Defendant
 23 Sangalang spoke mostly with Agent Gomez, but Agent McCarthy did overhear him tell Agent
 24 Gomez that he was affiliated with the "Seven Four Hoover Crips" gang out of Los Angeles
 25 which Agent McCarthy testified is a very large violent street gang that is involved in armed
 26 robberies and murders. *Id.* at pages 114-115.

27 During the meeting at Mr. D's, Mr. Beckworth told Agent McCarthy that Mr. Patton had
 28 a firearm that he wanted to sell, but that he needed the money to go get it. Agent McCarthy gave

1 Mr. Beckworth the money. Mr. Beckworth and Defendant Patton returned about a half hour
2 later. Beckworth informed the agent that "Patton wants to see you in the men's room." Agent
3 McCarthy, Beckworth and Patton proceeded to the men's room where Beckworth lifted up his
4 shirt and revealed a firearm in his waistband. Agent McCarthy testified that "I took the pistol
5 and then I started talking to -- then Mr. Patton started talking about the firearm as if it was his,
6 and I talked about the price, bringing down the prices, and he advised me he didn't know me well
7 enough; we'd have to do some more deals before he'd start cutting the price." *Id.*, pages 117-
8 118.

9 Agent Gomez testified that he was introduced to Defendant Sangalang by Mr. Beckworth.
10 *1/06/09 Hearing Transcript Docket No. 234*, pages 99-100. Defendant Sangalang told Agent
11 Gomez that he believed Mr. Pedrasa, who was not present, was an informant and he warned
12 Agent Gomez about Pedrasa. Agent Gomez testified that Sangalang, Pedrasa and Beckworth had
13 previously worked together at another tattoo parlor. *Id.*, pages 127-129. Mr. Sangalang
14 identified himself as a member of the Hoover Crips and introduced Defendant Patton as a "B,"
15 meaning that he was a "Blood," i.e., a gang member. *Id.*, page 129. Agent Gomez also testified
16 that the 74 Hoover Crips gang is an extremely large violent gang in Los Angeles. *Id.*, page 131.
17 During this initial meeting, Mr. Sangalang continually bragged about his gang affiliation and
18 stated "We're all killers." *Id.*, page 133. Audio recordings of the meeting were admitted into
19 evidence. *Government's Exhibit "4."* The voices on the recordings are muffled and in some
20 instances drowned out by background noise.

21 **3. Firearm Purchases from Defendants Sangalang and Patton**

22 Following the November 1, 2007 meeting, the agents engaged in firearms purchases from
23 Defendants Sangalang and Patton. Agent McCarthy testified that the agents purchased a stolen
24 Uzi pistol from Mr. Sangalang on November 7, 2007. On December 13, 2007, the agents
25 purchased three firearms from Mr. Sangalang and Mr. Patton, including a short-barrel or sawed-
26 off shotgun. On December 14, 2007, the agents purchased three short-barrel rifles with
27 obliterated serial numbers from Mr. Sangalang and Mr. Patton. On December 19, 2007, the
28 agents purchased another firearm with an obliterated serial number from Mr. Sangalang. On

1 January 7, 2008, the agents purchased a fully automatic machine gun from Sangalang. *12/19/08*
2 *Hearing Transcript (Docket No. 224)*, pages 119-121.

3 Agent Gomez testified that the firearm purchases from Mr. Sangalang and Mr. Patton
4 were set up through informant Richard Beckworth. *01/06/09 Hearing Transcript, Docket No.*
5 *234*, pages 135-154. In regard to the purchase of the stolen Uzi pistol, Agent Gomez told Mr.
6 Beckworth to tell Mr. Sangalang that the agents would be at the tattoo shop at a specified time if
7 he wanted do to the transaction. Mr. Beckworth showed up with Mr. Sangalang who was
8 carrying a bag which held the stolen Uzi. Mr. Sangalang then conducted the transaction with
9 Agent McCarthy in the tattoo parlor office. *Id.*, page 136. The firearm purchase from Sangalang
10 and Patton on December 13, 2007 was also arranged through Mr. Beckworth who was present in
11 the tattoo parlor when the transaction took place. On this occasion Mr. Sangalang removed a bag
12 containing the firearms from the trunk of Mr. Patton's vehicle. He then brought firearms into the
13 office and sold them to Agent McCarthy. *Id.*, pages 140-141. On December 14, 2007, the agents
14 purchased three short-barrel rifles with obliterated serial numbers from Sangalang and Patton.
15 *Id.*, page 142-143. Prior to this purchase, Agent Gomez received a call from Mr. Beckworth who
16 stated that Sangalang and Patton had more guns that they wanted to sell. *Id.*, page 144. During
17 the December 14th transaction, Mr. Patton and Mr. Sangalang stated that they had a cousin in
18 Atlanta who had access to fully automatic weapons. Patton and Sangalang attempted to set up a
19 deal with the undercover agents to traffic in firearms from Atlanta to Las Vegas. *Id.*, pages 145-
20 146.

21 Agent Gomez assumed that the purchase of a handgun with an obliterated serial number
22 and a shotgun from Defendant Sangalang on December 19, 2007 was also facilitated by Mr.
23 Beckworth. *Id.*, pages 149-150. In regard to the purchase of a fully automatic firearm from
24 Defendant Sangalang on January 7, 2008, Agent Gomez testified that it was his understanding
25 that Louis Acosta, a leader of the 28th Street gang, was in possession of this weapon. Mr. Acosta
26 contacted Mr. Beckworth, who in turn contacted Mr. Sangalang, who agreed to sell the weapon
27 to the undercover agents. *Id.*, page 154.

28 . . .

1 Agent Gomez testified that during November and December 2007, Mr. Sangalang did not
2 come to the Hustler's Tattoo parlor except to conduct the firearms transactions. Mr. Sangalang
3 would not come to the shop when Mr. Pedrasa was there because of his suspicion that Pedrasa
4 was an informant. In January or February 2008, Mr. Pedrasa started working at another tattoo
5 shop and Mr. Sangalang started hanging out at Hustler's Tattoo. *01/06/09 Hearing Transcript,*
6 *Docket No. 234*, page 156. The agents offered to allow him to work as a tattoo artist in the shop.
7 Initially, Sangalang worked there "on and off" and then daily. *Id.*, page 157 Agent Gomez
8 testified that he developed a close personal relationship with Mr. Sangalang once he started
9 working in the shop. They went to local strip clubs in the area and Agent Gomez helped
10 Sangalang move his stuff into the shop. Once Mr. Sangalang began working in the shop,
11 Defendant Patton also began hanging around the shop on a daily basis and Agent Gomez also
12 developed a personal relationship with him. *Id.*, pages 157-158.

13 **4. Narcotics Purchases from Defendants Sangalang and Patton**

14 Agent Gomez testified that Mr. Sangalang and Mr. Patton repeatedly tried to get the
15 undercover agents to purchase methamphetamine from them. Mr. Sangalang claimed that he had
16 sources for narcotics in Hawaii and Atlanta. The undercover agents initially declined to purchase
17 narcotics based on ATF management's decision that the operation would focus on illegal
18 firearms and because of the expense involved in purchasing illegal narcotics. *01/06/09 Hearing*
19 *Transcript, Docket No. 234*, pages 159-160. The agents eventually received authorization to
20 purchase narcotics from the Defendants. On February 25, 2008, Agent McCarthy purchased
21 seven grams of methamphetamine from Defendant Sangalang which he stated was a sample of
22 what he could provide. Mr. Sangalang claimed that his sources could provide large quantities of
23 narcotics. *Id.*, pages 162-163.

24 The agents subsequently purchased one and one-half ounces of methamphetamine from
25 Sangalang and Patton on March 25, 2008. During that transaction, the agents told Sangalang and
26 Patton that they were interested in purchasing large quantities of methamphetamine. On March
27 26, 2007, Agent Gomez had a phone conversation with Defendant Sangalang in which they
28 arranged the purchase of four ounces of methamphetamine on March 27th. On March 27, 2009,

1 the agents purchased 120 grams of methamphetamine from Defendant Sangalang and Patton. *Id.*,
2 pages 176-178. Following this transaction Defendant Sangalang showed Agent Gomez a
3 handgun that he kept in a drawer in his tattoo bay and “bragged” about the firearm. *Id.*, page
4 178. Agent Gomez testified that to his knowledge Mr. Beckworth was not involved in the
5 agents’ purchases of narcotics from Sangalang and Patton. He stated that once Sangalang and
6 Patton began working or regularly hanging out in Hustler’s Tattoo, there was no further
7 involvement between Beckworth and Sangalang and Patton. *Id.*, pages 167-169.

8 Prior to the March 25, 2007 narcotics transaction, the Government had obtained an order
9 for a pen register and trap and trace device on Mr. Sangalang’s and Mr. Patton’s cell phones.
10 Defendant Sangalang’s wife or fiancé worked at the telephone company and was reportedly
11 informed by a supervisor that law enforcement was monitoring the phones. Agent McCarthy
12 testified that he learned of this when Defendant Patton’s wife came to Hustler’s Tattoo and spoke
13 to Defendant Patton. Mr. Patton turned to Sangalang and advised him to get rid of their phones
14 because they were hot. Agent McCarthy thereafter confronted Defendant Sangalang in the tattoo
15 parlor office to try to obtain information on how the pen register had been compromised and to
16 also suggest that Sangalang and Patton were responsible for having brought law enforcement
17 attention onto the undercover agents. During this meeting Agent McCarthy asked Sangalang
18 how old he was. Sangalang responded 33. Agent McCarthy told Sangalang that if he wanted to
19 be around when he was 34, then he shouldn’t talk on the phone. *01/06/09 Hearing Transcript*
20 *Docket No. 234*, page 23. Agent Gomez testified that he and Agent McCarthy pretended to be
21 upset with Sangalang and Patton because they had gotten the undercover agents involved in a law
22 enforcement investigation. He testified that Mr. Sangalang appeared to feel bad about this.
23 Thereafter, Sangalang and Patton were more careful in communicating on the telephone and Mr.
24 Sangalang used code words when he discussed narcotics transactions with the agents. *Id.*, pages
25 169-175.

26 ...

27 ...

28 ...

1 **5. Development of Robbery Conspiracy Plan Between Undercover Agents and**
2 **Defendants**

3 Agent Gomez testified that Defendant Alfredo Flores began hanging out at Hustler's
4 Tattoo about the same time that Defendant Sangalang started working there. *01/06/09 Hearing*
5 *Transcript, Docket No. 234*, page 179. Mr. Flores drove Mr. Sangalang and Mr. Patton to the
6 shop in his automobile almost daily and Agent Gomez believed that they all lived together. *Id.*
7 Agent Gomez also developed a personal relationship with Mr. Flores. *Id.*, pages 178-179. Mr.
8 Flores hung out at the shop on a nearly nightly basis. Agent Gomez testified that Flores "was
9 always bragging about his gang affiliation, his crews, he could do this, he could do that." *Id.*,
10 pages 201-202. According to Agent Gomez, Mr. Flores stated that he wanted to sell drugs to the
11 undercover agents. Agent Gomez testified, however, that the agents did not purchase drugs from
12 Flores prior to April 2008 because he appeared to be living with Mr. Sangalang and Mr.
13 Sangalang appeared to be the leader of Patton and Flores. *Id.*, page 202.

14 Agent Gomez testified that the undercover agents were also dealing with another
15 individual named Donte Reed to whom they had been introduced by informant Jaime Pedrasa.
16 The undercover agents purchased firearms from Donte Reed between February and March 2008.
17 *01/06/09 Hearing Transcript, Docket No. 234*, pages 181-182. Mr. Reed told the agents that he
18 had previously been involved in home invasions and burglaries and had "a home invasion crew"
19 that was interested in doing a robbery or "lick." *Id.* The undercover agents met with Donte Reed
20 in the Hustler's Tattoo office on April 17, 2008 and apparently discussed a home invasion
21 robbery with Mr. Reed. According to Agent Gomez, Defendant Sangalang appeared to be upset
22 after the agents met with Mr. Reed. He explained that "everybody" at Hustler's Tattoo knew the
23 agents were conducting firearms deals in the tattoo parlor office and that Sangalang and Patton
24 would get upset when they observed the agents dealing with other individuals. *Id.*, pages 183-
25 184. Mr. Sangalang would make statements such as "Why are you dealing with those guys?"
26 "Why are you cutting me out?" *Id.*, at page 183.

27 According to Agent Gomez, prior to April 18, 2008 Defendant Flores had stated that he
28 had a crew of individuals who were willing to do robberies. *Id.*, at page 200. The agents decided

1 to pitch a home invasion robbery to Mr. Flores. Agent Gomez further explained:

2 But the reason he was pitched is because of his relationship with
3 the undercover agents and, like I said, just the daily -- the dealings
4 that we had done with Sangalang and Patton; he was part of their
5 crew. Sangalang was kind of pitched simultaneously later that
6 night. And it was just a continuation of their -- of not only the
7 deals, the narcotics transactions and the firearms transactions, but
8 also the daily bragging. And, you know, and we had developed a
9 personal relationship with them and -- that we didn't develop with
10 other defendants. You know, other defendants would just do deals
11 and leave, and these defendants we developed a personal
12 relationship with, and they kept telling us how bad and how tough
13 they were and all of their gang affiliations.

14 *01/06/09 Hearing Transcript Docket No. 234, pages 203-204.*

15 On April 18, 2008, Defendant Flores met with Agent McCarthy and Agent Gomez in the
16 tattoo parlor office to transact a two ounce narcotics deal. *12/19/08 Hearing Transcript, Docket*
17 *No. 224, pages 129-130; 01/06/09 Hearing Transcript, Docket No. 234, page 200;* and
18 *Government's Exhibit "8"* (audio/video recording of April 18, 2008 meeting). After the
19 narcotics transaction was completed, Agent McCarthy asked Mr. Flores if he had a crew or stated
20 that he heard that Flores had a crew. He then asked Mr. Flores if he was "down for a lick," i.e.
21 willing to do a robbery. Mr. Flores responded that he was interested depending on the details.
22 Agent McCarthy stated the undercover agents could not do the robbery because they were known
23 to the prospective victims. Agent McCarthy then left the room and brought undercover ATF
24 Agent Christopher Bayless into the room to explain the planned robbery.

25 Upon entering the office, Agent Bayless asked Mr. Flores if he had "maybe a crew" and
26 was "down for a lick or something?" Mr. Flores responded affirmatively. Agent Bayless told
27 Mr. Flores that he worked as a courier for a narcotics trafficking organization that shipped
28 narcotics through Las Vegas. He stated that he picked up shipments of 20-25 kilos of narcotics
approximately every three or four weeks from a house in Las Vegas. He would then transport the
narcotics to Chicago. The location of the house would change each time and Agent Bayless
would be notified by phone shortly before the pick-up where it was to occur. Agent Bayless told
Defendant Flores that as a result of the loss of a shipment by an individual whom he had set up to
transport a load, Agent Bayless was being required to pay the traffickers \$50,000. He indicated

1 that he was angered about this and therefore now wanted to “knock them off.” Agent Bayless
 2 stated that there were generally two persons present in the “stash house” where the drugs were
 3 picked up. He stated that these individuals were “strapped,” meaning they were armed and that
 4 they were “hitters.” *Government’s Exhibit “8”*

5 Agent Bayless stated that it was no problem if Mr. Flores did not want to get involved in
 6 the robbery. He stated, however, that if Flores had a crew that were “hitters” and were willing to
 7 do this type of robbery, then they could potentially work out a deal. Mr. Flores again stated he
 8 was interested, depending on the circumstances. Agent Bayless indicated that it would be
 9 necessary for the robbers to “rap” him during the robbery to make it appear that Bayless was also
 10 a victim. In response to this, Mr. Flores indicated that everyone would be put down. Agent
 11 Bayless also stated that the persons guarding the drug house might use their weapons to resist and
 12 that the robbers would need to be prepared to shoot or kill them. Mr. Flores appeared to
 13 acknowledge this and indicated that he and his crew would be prepared for such an eventuality.

14 *Id.*

15 Agent Gomez testified that Mr. Flores had no hesitation about participating in the
 16 proposed robbery. He testified that Mr. Flores made statements such as “we’re coming in ready
 17 for war,” “all my boys grew up gang-banging,” and that the crew members would “put down”
 18 the persons guarding the stash house. *01/06/09 Hearing Transcript, Docket No. 234*, page 205.
 19 Defendant Flores also suggested the possibility of “kidnapping” Agent Bayless from the stash
 20 house to make it appear that he was a victim. Agent Bayless agreed that this might be a good
 21 idea. Agent McCarthy also testified that Mr. Flores made such statements during the April 18th
 22 meeting. *12/19/08 Hearing Transcript, Docket No. 224*, pages 128-130. The meeting ended
 23 with Agent Bayless telling Defendant Flores that they would meet again to further develop the
 24 robbery plan.

25 Agent Gomez testified that he discussed the home invasion or stash house robbery pitch
 26 with Defendant Sangalang later on April 18, 2008. In explaining why the pitch was also made to
 27 Mr. Sangalang, Agent Gomez testified:

28 . . .

1 Well, because we knew they were one crew, really. And we knew
 2 that Flores would go to Sangalang and talk to him. In addition,
 3 Sangalang was upset that we had talked to Flores, and he was upset
 4 that the other crew he had saw in there -- he wanted to know why
 5 we were dealing with those guys. You know, "Why are those guys
 here? Why are you doing business with them?" So, he was upset.
 And, so, I told him what we were doing with those guys. And he
 said to me, "Well, if they can't get a crew together, I can get a crew
 together."

6 *01/06/09 Hearing Transcript, Docket No. 234, page 206.*

7 Agent Gomez testified he initially discussed the home invasion plan with Defendant
 8 Sangalang during a trip to a store. Agent Gomez recorded this conversation. *See Government's*
 9 *Exhibit "6."* The recording supports Agent Gomez's testimony regarding his initial discussion
 10 with Defendant Sangalang. Agent Gomez told Defendant Sangalang that Agent McCarthy was
 11 reluctant to involve Sangalang in the planned robbery because of the "heat" that might be brought
 12 down on him and also the possibility that the agents would be connected to the robbery.

13 Defendant Sangalang expressed his desire to participate and indicated that he could put a "killer
 14 killer crew together." Defendant Sangalang also stated that his crew had experience doing
 15 armored car robberies. *01/06/09 Hearing Transcript, Docket No. 234, pages 206-213.* Agent
 16 Gomez told Defendant Sangalang that he would speak to Agent McCarthy to see if he wanted to
 17 include Sangalang in some type of robbery. According to Agent Gomez, Defendant Sangalang
 18 seemed very eager to be involved and was adamant that he could put a crew together. *Id.*, pages
 19 218-219.

20 On April 23, 2008, Agents McCarthy, Gomez and Bayless met with Defendant Sangalang
 21 in the Hustler's Tattoo office to discuss the proposed robbery. Similar to the meeting with
 22 Defendant Flores on April 18th, Agent McCarthy initially presented the general idea for the
 23 robbery to Mr. Sangalang and inquired whether he was interested in participating. Agent
 24 McCarthy stated that if he was not interested, the discussion would end there. Defendant
 25 Sangalang stated that he was interested. Agent McCarthy and Sangalang discussed the logistics
 26 and complications involved in conducting such a robbery. Mr. Sangalang stated that he had a
 27 crew of individuals who could commit the robbery, but that these individuals might want to be
 28 paid something in advance of the robbery. Mr. Sangalang indicated that he would have more

1 difficulty selling the robbery to his crew if they would only receive payment after the robbery
2 was completed. Mr. Sangalang also stated that it might be necessary for him to seek individuals
3 outside his “hood” to commit the robbery so that it could not be traced back to him. Sangalang
4 indicated, however, that he knew such individuals whom he could potentially recruit. During this
5 conversation, Agent McCarthy also stated that it might necessary to kill the “inside guy” who
6 would disclose the location of the narcotics traffickers’ money stash house that would also be
7 robbed. Defendant Sangalang appeared to agree with this. *See Government’s Exhibit “4”,*
8 *Video/Audio Recording.* (The sound on this recording is not clear because of background noise.
9 Defendant Sangalang’s voice is not clearly audible, but his words can generally be made out on
10 close listening.)

11 McCarthy and Sangalang then briefly left the office. Agent McCarthy returned with
12 Agent Bayless who sat behind the desk. Agent Bayless then explained the proposed robberies.
13 He told Sangalang that he initially didn’t think they could rob the “money house,” i.e., where
14 drug sale proceeds were located, but the agents had an “inside” person who would provide them
15 with the location of that house so that it could also be robbed simultaneously with the drug stash
16 house. *Government’s Exhibit “4”, Video/Audio Recording.* Agent Bayless stated that he would
17 receive a phone call telling him where the drug stash house was located and that he would be
18 given a 30-minute window in which to make the pick-up. Agent Bayless stated that there would
19 be 80 to 100 kilograms of narcotics in the drug stash house. He also stated that the individuals
20 guarding the stash house were armed and would “not give it up because we say so.” He stated
21 that the robbers, however, would have the element of surprise. There appeared to be mutual
22 agreement between Bayless, McCarthy and Sangalang that it might be necessary to kill the
23 persons in the drug and money stash houses. Agent Bayless asked Sangalang how many crew
24 members he would need to commit the robberies. Sangalang indicated three or possibly four for
25 each house.

26 Agent Gomez testified about various statements that Defendant Sangalang made during
27 this meeting, including the possible need to kill the persons in the stash houses and that some of
28 his crew members had committed armored truck robberies. *01/06/09 Hearing Transcript, Docket*

1 No. 234, pages 233-234. In response to a statement by Agent Bayless, Mr. Sangalang joked that
2 his gang members would “do it for free” ---“they shoot people for free.” Mr. Sangalang also
3 reportedly stated that after the robbery was committed and the persons were killed, he would
4 leave some drugs in the house and burn it down. *Id.*, at page 235. Defendant Sangalang also
5 stated that he did not want to have to kill any of his own people after the robbery. Mr. Sangalang
6 stated that his crew members were “hitters” which Agent Gomez interpreted as meaning that they
7 were violent criminals. *Id.*, pages 236-237. Near the end of the meeting, Defendant Sangalang
8 also stated: “I did it for colors when I was young. I might as well do it for something green.”
9 According to Agent Gomez, “colors” was reference to Mr. Sangalang’s gang affiliation. *Id.*, at
10 page 238. Mr. Sangalang also expressed some reservations about Defendant Flores. Defendant
11 Flores was brought into the room and Mr. Sangalang asked him about his ability to form a crew
12 and who he was thinking about as potential crew members. *Id.*, page 237-238. Agent McCarthy
13 gave similar testimony concerning Mr. Sangalang’s statements during the April 23, 2008
14 meeting. *12/19/08 Hearing Transcript, Docket No. 224*, pages 133-134, 141-142.

15 Not all of Mr. Sangalang’s statements are clearly audible on the recording. *Government’s*
16 *Exhibit “4”*. The Court’s review of the recording, however, appears to support the agents’
17 testimony. Agents McCarthy and Gomez were present during the meeting and, in addition to
18 reviewing the recording, they also have the benefit of reviewing their reports of investigation
19 prepared after the meeting. The recording does show that Mr. Sangalang was actively engaged
20 with the undercover agents in discussing the methods and means for conducting the robbery,
21 including the difficulties that might be encountered.

22 Agent Gomez testified that he had a follow-up conversation with Defendant Sangalang on
23 April 25, 2008 about the proposed robbery. Agent Gomez attempted to record the meeting, but
24 the recorder malfunctioned. He did, however, prepare a report of the conversation. *01/06/09*
25 *Hearing Transcript, Docket No. 234*, page 240. Mr. Sangalang told Agent Gomez that he had
26 started recruiting members for his robbery crew and had chosen individuals for specific roles. He
27 did not identify any of the crew members. Agent Gomez and Mr. Sangalang agreed to meet the
28 following week to discuss the robbery. *Id.*, pages 241-242.

1 Agent Gomez testified that there was a subsequent meeting between Agent McCarthy,
2 Agent Bayless and Defendant Sangalang in Hustler's Tattoo on May 6, 2008 which was
3 recorded. Agent Gomez was not present during that meeting. *Id.*, page 243. The audio
4 recording of the May 6, 2008 meeting was admitted into evidence as *Government's Exhibit*
5 "4BB". During this meeting, Agent Bayless stated he was ready to go forward with the robberies
6 the following week. He asked Defendant Sangalang if his crew was ready and would be coming
7 into town. Defendant Sangalang indicated that his crew members were already in Las Vegas.
8 There was further discussion about dividing and laundering the proceeds of the robbery. There
9 was also discussion about using rental vehicles to conduct the robberies and the number of crew
10 members who would commit each robbery. Another meeting occurred on May 7, 2008 at Mr.
11 D's Bar which was attended by Agent McCarthy, Agent Bayless, two other undercover agents
12 and Defendants Sangalang and Flores. Agent Gomez was also not present during that meeting.
13 Agent Gomez was informed that during the May 7, 2008 meeting Agent McCarthy or Agent
14 Bayless told the Defendants that one of the undercover agents with them was the "inside guy"
15 who was to be killed during or following the money stash house robbery. *Id.*, pages 244-246.

16 Agent Gomez testified that agents again met with the Defendants on May 12, 2008 to
17 discuss the logistics of the robberies. *1/09/09 Hearing Transcript, Docket No. 239*, page 52.
18 Initially, Agents McCarthy, Bayless and Gomez met with Defendants Sangalang, Flores and
19 Patton. Defendant Roderick Jones later joined the meeting. *Id.* Agent Gomez testified that May
20 12, 2008 was the first occasion that Defendant Patton participated in the robbery planning
21 meetings. *Id.*, page 67. At the beginning of this meeting, there was a discussion among the
22 agents and then between Defendants Patton and Sangalang about whether to kill the "inside guy"
23 at the money house or bring him back to the tattoo parlor or somewhere else to be killed.
24 Defendant Sangalang demonstrated to Defendant Patton how to tie someone up. *Id.*, pages 67-
25 68. Defendant Patton also discussed killing the guards by cutting their throats. *Id.* The
26 video/audio recording of this meeting, *Government's Exhibit "4-1"*, shows that the discussion
27 was led by Agent Bayless with Defendant Sangalang and Defendant Patton actively participating.
28 Defendant Flores was present but remained largely silent. Agent Gomez testified that the

1 Defendants became excited and were laughing and joking about performing the robberies and the
2 associated murders. *Id.*, pages 69-70. The recording supports this statement.

3 Once Defendant Roderick Jones joined the meeting, Agent Bayless explained the
4 essentials of the robbery plan to him. *1/09/09 Hearing Transcript, Docket No. 239*, page 7;
5 *1/26/09 Hearing Transcript, Docket No. 249*, page 9. *See also Government's Exhibit "4-1."*
6 According to Agent Gomez, Defendant Jones agreed to participate in the robbery and he bragged
7 about a prior robbery he had performed. Defendant Jones also discussed having the robbers pose
8 as police officers and obtaining uniforms for that purpose. *1/26/09 Hearing Transcript, Docket*
9 *No. 249*, pages 9-10. Defendant Roderick Jones also discussed cutting the throats of the persons
10 guarding the stash house. *Id.*, page 32.

11 Agent Gomez testified that the agents again met with the Defendants on May 14, 2009 to
12 finalize the robbery plans. During this meeting Defendant Roderick Jones stated that he intended
13 to pose as a police officer during the robbery to "freeze" the persons in the stash house.
14 Defendants Robert Williams and Derek Jones were present during this meeting and Defendant
15 Sangalang explained the robbery plans to Defendant Williams. Defendant Sangalang also told
16 the crew members that if anyone didn't want in, they could leave now. Defendant Patton
17 discussed how he would kill the "inside guy." *1/26/09 Hearing Transcript, Docket No. 249*,
18 pages 35-44. Agent Gomez also testified that following the meeting, he spoke with Defendants
19 Derek Jones and Roderick Jones in the front of Hustler's Tattoo. During this conversation,
20 Derek Jones and Roderick Jones talked about a prior car-jacking robbery that they had
21 committed. *Id.*, pages 46-47.

22 On May 15, 2008, the Defendants assembled at Hustler's Tattoo in preparation to commit
23 the robberies. Also present were Agents McCarthy, Bayless, Gomez, Zayas and another
24 undercover agent. *1/26/09 Hearing Transcript, Docket No. 249*, page 47-48. Agent Gomez
25 testified that the Defendants were dressed in black, except for Defendant Sangalang. The
26 Defendants brought their own firearms and had two bags of zip ties and a radio scanner. Derek
27 Jones also had a police badge. *Id.*, page 49-50. Agent McCarthy also testified that the
28 Defendants had ski masks. *12/19/07 Hearing Transcript, Docket No. 224*, page 144. Agent

1 Gomez testified that the agents had their own ATF issued firearms but did not bring any other
 2 firearms to the meeting. Agent McCarthy asked the Defendants if they had their “tools”, i.e.
 3 firearms. Defendants Sangalang and Patton responded that they had theirs. Agent McCarthy
 4 stated that he could get more weapons. Agent Gomez testified, however, that that was just street
 5 theater and the agents did not obtain or provide any weapons. *Id.*, page 50.

6 The Defendants and the undercover agents then drove to the rendezvous location where
 7 Defendants believed they would get into two rental vans to go to the robbery locations. Instead,
 8 an ATF SWAT team was waiting to arrest the Defendants. Agent McCarthy testified that
 9 undercover agents drove to the rendezvous location in a Chevrolet Suburban and the Defendants
 10 followed them in three vehicles. None of the undercover agents rode with the Defendants.
 11 *12/19/07 Hearing Transcript, Docket No. 224*, page 151. Once the Agents and Defendants
 12 arrived at the rendezvous point and exited the vehicles, a prearranged signal was given and the
 13 SWAT team closed in and arrested the Defendants.

DISCUSSION

1. Whether the Indictments Should Be Dismissed Based on Outrageous Government Conduct

17 The potential for dismissal based on outrageous government conduct in violation of the
 18 Due Process Clause of the Fifth Amendment was recognized by the Supreme Court in *United*
 19 *States v Russell*, 411 U.S. 423, 431-32, 93 S.Ct. 1637, 1642-43 (1973) and *Hampton v. United*
 20 *States*, 425 U.S. 484, 96 S.Ct. 1646 (1976). Dismissal on this basis is limited to extreme cases in
 21 which the government’s conduct violates fundamental fairness and is shocking to the universal
 22 sense of justice. *United States v. Williams*, 547 F.3d 1187, 1199 (9th Cir. 2008), citing *United*
 23 *States v. Holler*, 411 F.2d 1061, 1065 (9th Cir. 2005). The Ninth Circuit has stated that law
 24 enforcement conduct becomes constitutionally unacceptable where government agents engineer
 25 and direct a criminal enterprise from start to finish or when government conduct constitutes, in
 26 effect, the generation of new crimes merely for the sake of pressing criminal charges against the
 27 defendant. *United States v. Bogart*, 783 F.2d 1428, 1436 (9th Cir. 1986). *Bogart* noted that in
 28 each of the cases in which the outrageous conduct defense has succeeded, the government

1 essentially manufactured the crime. *Id.*

2 In determining whether particular government conduct is sufficiently outrageous that it
 3 implicates due process concerns, the court must take special care not to permit the objective
 4 analysis of this “defense” to swallow the subjective entrapment rule. The government’s
 5 intolerable conduct must go beyond that necessary to sustain an entrapment defense, and the
 6 court must exercise scrupulous restraint before it denounces law enforcement conduct as
 7 constitutionally unacceptable. The constitutional defense is reserved for only the most
 8 intolerable government conduct. *United States v. Bogart*, 783 F.2d at 1435. The courts have
 9 denied motions to dismiss in a variety of circumstances where the conduct of government agents
 10 or informants fell short of manufacturing the charged crimes. In *United States v. Smith*, 924 F.3d
 11 889, 897 (9th Cir. 1991), for example, the court held that the government’s conduct in
 12 encouraging an 18 year old drug patient in a treatment center to deal drugs to the defendant, who
 13 was also a patient, did not violate due process. The court noted that there was evidence that
 14 defendant was predisposed to deal in drugs. *Smith* also cited the following examples of
 15 government conduct that the courts have held does not warrant dismissal:

16 Use of false identities by undercover agents, *Shaw*, 796 F.2d at
 17 1125, and *United States v. Marcello*, 731 F.2d 1354, 1357 (9th
 18 Cir.1984); the supply of contraband at issue in the offense,
Hampton v. United States, 425 U.S. 484, 489, 96 S.Ct. 1646,
 1649-50, 48 L.Ed.2d 113 (1976); the commission of equally
 19 serious offenses by an undercover agent as part of the
 investigation, *United States v. Stenberg*, 803 F.2d 422, 430 (9th
 20 Cir.1986); the introduction of drugs into a prison to identify a
 distribution network, *United States v. Wiley*, 794 F.2d 514, 515
 (9th Cir.1986); the assistance and encouragement of escape
 21 attempts, *United States v. Williams*, 791 F.2d 1383, 1386 (9th Cir.),
cert. denied, 479 U.S. 869, 107 S.Ct. 233, 93 L.Ed.2d 159 (1986);
 22 use of a heroin-using prostitute informant whose own activities
 were under investigation and who engaged in regular intercourse
 23 with the defendant, *United States v. Simpson*, 813 F.2d 1462,
 1465-71 (9th Cir.1987).

24
 25 A district court may also exercise its supervisory powers to dismiss an indictment in
 26 response to outrageous government conduct that falls short of a due process violation. To justify
 27 the exercise of the court’s supervisory powers, however, the government’s misconduct must (1)
 28 be flagrant and (2) cause substantial prejudice to the defendant. *United States v. Fernandez*, 388

1 F.3d 1199, 1239 (9th Cir. 2004), citing *United States v. Ross*, 372 F.3d 1097, 1109 (9th Cir. 2004).
 2 Where the motion concerns the government's out-of-court conduct, dismissal is not proper
 3 absent a constitutional or statutory violation. Dismissal on this ground also requires that no other
 4 lesser remedial action be available. *United States v. Chapman*, 524 F.3d 1073, 1087 (9th Cir.
 5 2008).

6 **A. Robbery Conspiracy Charged in Case No. 2:08-cr-163-JCM-GWF**

7 In *United States v. Williams*, 547 F.3d 1187 (9th Cir. 2008), the court rejected a claim of
 8 outrageous government conduct in regard to an undercover sting operation similar to the one
 9 alleged in Case No. 2:08-cr-163-JCM-GWF. The defendant in *Williams* initially engaged in
 10 narcotics transactions with a government informant. The defendant thereafter told the informant
 11 about a bank robbery he was planning to commit and which he had already planned in some
 12 detail. The informant relayed this information to an ATF agent who proposed that the informant
 13 pitch the idea of robbing a fictitious drug stash house to defendant in lieu of robbing a bank. The
 14 informant subsequently introduced defendant to an undercover ATF agent who posed as a person
 15 who wanted to organize the drug stash house robbery. During subsequent conversations, the
 16 undercover agent and the defendant discussed more details about how to conduct the robbery
 17 which included a plan to kill the persons guarding the drug stash house. The defendant thereafter
 18 assembled a crew of individuals who armed themselves with the weapons and other equipment to
 19 be used in the robbery. When the suspects met at the staging area to perform the robbery, they
 20 were arrested.

21 In affirming the denial of the motion to dismiss, *Williams* cited the five factors set forth in
 22 *United States v. Bonanno*, 852 F.2d 434, 437-438 (9th Cir. 1988) that, when satisfied, indicate
 23 that the governmental conduct was acceptable:

24 (1) the defendant was already involved in a continuing series of
 25 similar crimes, or the charged criminal enterprise was already in
 26 progress at the time the government agent became involved; (2) the
 27 agent's participation was not necessary to enable the defendants to
 28 continue the criminal activity; (3) the agent used artifice and
 stratagem to ferret out criminal activity; (4) the agent infiltrated a
 criminal organization; and (5) the agent approached persons
 already contemplating or engaged in criminal activity.

1 Williams, 547 F.3d at 1199-1200.

2 Williams held that all five factors were met under the facts of that case. The agents
 3 infiltrated an already existing criminal organization that had committed and was planning to
 4 commit crimes similar to that suggested by the undercover agents. The court stated that the
 5 agents' conduct was best characterized as a "stratagem to ferret out criminal activity" that the
 6 defendant was already contemplating and "[t]he government's decision to use a sting operation to
 7 apprehend this group of criminals reduced the risk of violence to the public and is to be
 8 commended, not condemned." Williams, 547 F.3d at 1201. In a footnote to this statement,
 9 Williams further states:

10 In connection with the outrageous government conduct claim, the
 11 appellants present two additional arguments. First, they argue that
 12 the government created a crime of violence, in violation of Justice
 13 Powell's concurrence in *Hampton v. United States*, 425 U.S. 484,
 14 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976). Justice Powell stated:
 15 "There is certainly a constitutional limit to allowing governmental
 16 involvement in crime. It would be unthinkable, for example, to
 17 permit government agents to instigate robberies and beatings
 18 merely to gather evidence to convict other members of a gang of
 19 hoodlums." *Hampton*, 425 U.S. at 493 n. 4 (Powell, J., concurring
 20 in the judgment) (quoting *United States v. Archer*, 486 F.2d 670,
 21 676-77 (2d Cir.1973)). The government correctly notes that Justice
 22 Powell was referring "to government conduct that would encourage
 23 and condone direct and deliberate harm to others," such as if the
 24 government prosecuted a defendant for robbery after encouraging
 25 the defendant to rob a victim. Justice Powell's concurrence
 26 explicitly approves the use of sting operations to combat drug
 27 offenses. See *Hampton*, 425 U.S. at 493 (Powell, J., concurring).
 28 Here, the sting operation not only involved drugs, it was also
 designed to catch Williams, a known bank robber and drug dealer,
 in a *conspiracy* to perform the types of acts that he already
 indicated his willingness to perform and had begun planning. The
 government did not instigate a robbery or beating "merely to gather
 evidence to convict other members of a gang of hoodlums." *Id.* at
 493 n. 4. They devised a plan to catch a potentially dangerous
 group of robbers in a controlled sting operation.

Second, the appellants argue that the government directed the
 criminal scheme from start to finish. This argument lacks merit
 because Williams was intimately involved in the development of
 the plan. Williams hatched the bank robbery scheme entirely on his
 own, and he participated in the planning stages of the stash house
 robbery. He arranged for his crew to help him, including
 instructing Hollingsworth to bring a gun and a police scanner to the
 motel. He sold weapons to raise money to rent the car for the
 robbery, and he repeatedly indicated his willingness to do the job.
 Government agents may have "provide[d] valuable and necessary

1 items to the venture," *Gurolla*, 333 F.3d at 950, but that is
 2 insufficient to demonstrate that the government directed the
 enterprise from start to finish. *Id.*

3 *Williams*, 547 F.3d 1201, footnote 11.

4 In *United States v. Sanchez*, 138 F.3d 1410 (11th Cir. 1998), the Eleventh Circuit also
 5 affirmed the denial of a motion to dismiss based on outrageous government conduct in regard to
 6 a "reverse sting" operation similar to the one at issue in this case. According to the court's brief
 7 statement of facts, the ATF received information from a confidential informant about a group of
 8 armed home invaders who would "rip-off" narcotics from stash houses. Through the informant,
 9 the government created a reverse sting operation by which the defendants agreed to all of the
 10 details of a home invasion. Defendants thereafter were arrested in a parking lot where they had
 11 assembled in readiness to commit the robbery. In holding that the government did not engage in
 12 outrageous conduct, the *Sanchez* court stated:

13 The evidence reveals that ATF agents contacted individuals
 14 suspected of being involved in home invasions. Informed by these
 15 individuals that large amounts of narcotics could be stolen in a
 16 home invasion, defendants voluntarily agreed to participate. The
 17 defendants were involved without any instigation from the
 18 government. They only had contact with the government agent
 19 after they had already agreed to participate. The availability of
 20 defendants, their weapons and vehicles was not the result of any
 21 governmental activity. The conduct of the government here does
 22 not approach that demonstrable level of outrageousness the case
 23 law suggests would be necessary for reversal of these defendants'
 24 convictions.

25 *Sanchez*, 138 F.3d at 1413-1414.

26 The reasonableness of the ATF's decision to pitch the robberies to Defendants Flores and
 27 Sangalang is not as readily defensible as its conduct in *Williams* or *Sanchez*. The ATF did not
 28 have information that Defendants Flores or Sangalang were actually planning an armed robbery
 or a similar violent crime. Nor did the ATF have information that Flores and Sangalang had
 performed home invasion/stash house robberies in the past. The ATF, however, had a reasonable
 basis to believe that Defendants Flores and Sangalang would be receptive to the proposed
 robberies based on their previous statements and conduct.
 . . .

1 Agent Gomez testified that the robbery pitch was made to Flores and Sangalang because
2 of their previous bragging regarding their violent gang affiliations. Defendant Flores also told
3 the agents that he had a crew of individuals who were willing to commit robberies. Defendant
4 Sangalang had also told the undercover agents about his violent gang association or membership
5 and he had sold illegal firearms and drugs to the agents. According to Agent Gomez, Mr.
6 Sangalang also became upset when he observed the agents dealing with Donte Reed and wanted
7 to know why the agents were dealing with “those guys.” After Agent Gomez told Sangalang
8 about the robbery plan proposed to Mr. Reed, Defendant Sangalang stated: “Well, if they can’t
9 get a crew together, I can get a crew together.” *01/06/09 Hearing Transcript, Docket No. 234,*
10 page 206. Thus, Defendant Sangalang expressed his desire to be involved in the agents’ robbery
11 plans even before the details of the robbery were presented to him.

12 Defendants Flores’ and Sangalang’s responses to the pitches also justified the undercover
13 agents’ decision to continue to pursue the reverse sting. According to Agents Gomez and
14 McCarthy, neither Mr. Flores nor Mr. Sangalang expressed reluctance about committing the
15 robberies and murders. The recordings appear to confirm this. Once the pitches were made, both
16 Defendants expressed their interest and willingness to commit the robbery, although Mr.
17 Sangalang, in particular, discussed with the agents the difficulties that could be encountered.
18 This included the danger that the robbers’ identities would be discovered by the narcotics
19 traffickers whose drugs and money would be stolen and whether Mr. Sangalang’s potential crew
20 members would agree to participate without some advance payment. Within two days after the
21 pitch, however, Defendant Sangalang told Agent Gomez that he had started recruiting crew
22 members and had chosen individuals for specific roles.

23 The undercover agents, in particular Agent Bayless, provided Flores and Sangalang with
24 the details about the proposed robberies, including the robbery locations, how much narcotics or
25 cash were likely to be taken, and the number of persons in each house. If Agent Bayless did not
26 actually tell Flores and Sangalang that they should kill the stash house guards, he suggested it by
27 telling them that the guards were “strapped” and were “hitters” and would likely resist. The
28 agents also suggested that it would probably be necessary to kill the inside guy. Although the

1 undercover agents provided and exercised control over key information as to when and where the
 2 robberies would take place, they left it to Defendant Sangalang and Flores to form the robbery
 3 crews. Mr. Sangalang or Mr. Flores recruited the other defendants to join the robbery conspiracy
 4 and selected which individuals would be in the respective crews. Some of those crew members
 5 told the agents that they had previously committed armed robberies. During the meetings with
 6 the agents, the Defendants discussed the methods or means they would use to commit the
 7 robberies. This included impersonating police officers and how and where to kill the persons in
 8 stash house and the “inside guy.” Defendants supplied their own firearms and other equipment,
 9 including zip-ties, ski masks and a police radio scanner. On the day of the robbery, the
 10 Defendants followed the undercover agents to the rendezvous location in their own vehicles. As
 11 *Williams* states, these types of actions substantially detract from a finding that the government
 12 orchestrated or directed the enterprise from start to finish.

13 The Court therefore finds that the ATF agents’ conduct in regard to the fictitious stash
 14 house robberies was not so outrageous as to require dismissal under the Due Process Clause of
 15 the Fifth Amendment or pursuant to the Court’s supervisory powers.

16 **B. Firearms and Narcotics Crimes Charged in Case Nos. 2:08-cr-140-**
 17 **KJD-GWF and 2:08-cr-141-KJD-GWF**

18 Defendants argue that the indictments in Case Nos. 2:08-cr-140-KJD-GWF and 2:08-cr-
 19 141-KJD-GWF relating to illegal firearm and narcotics sales, should be dismissed because the
 20 undercover agents or the informant Richard Beckworth made threats against the defendants.

21 Defendant Deandre Patton was the only Defendant to testify during the hearing. *05/11/09*
 22 *Hearing Transcript, Docket No. 344, pages 6-52; 95-140.* He testified that he believed Agents
 23 McCarthy and Gomez were bikers and Hells Angels. Mr. Patton stated that on one occasion
 24 Agent McCarthy made a statement “basically stating that the people that he worked with, they
 25 don’t f*** around, and if we didn’t get our stuff together that everybody could die, everybody
 26 would die, our families, everybody.” *Id.*, page 19. Defendant Patton also testified that Agent
 27 Gomez told the Defendants that he was vouching for them to Agent McCarthy, that they had to
 28 make themselves look good to McCarthy and that if they didn’t, it would fall back on him. *Id.*,

1 page 18-19. Defendant Patton also testified that Mr. Beckworth showed him and Defendants
2 Sangalang and Flores a video of a fight in which Mr. Beckworth beat up another individual. *Id.*,
3 page 11. Mr. Patton stated that he was not frightened or concerned about his safety from
4 watching the video. He stated, however, that he felt concerned about Mr. Beckworth at certain
5 times because he “wasn’t acting like a regular person” and appeared to be a “hothead.” He was
6 not, however, in physical fear of Mr. Beckworth. *Id.*, pages 41-42.

7 While Defendant Patton’s testimony may be relevant to an entrapment defense at trial, it
8 clearly does not warrant dismissal of the indictments. The undercover agents portrayed
9 themselves as the operators of a criminal enterprise who were involved in the purchase of illegal
10 firearms and narcotics. Agent McCarthy’s and Agent Gomez’s alleged statements about what
11 might happen if the Defendants did not fulfill their obligations was consistent with their role-
12 playing. The alleged statements did not involve specific threats to Mr. Patton or any other
13 Defendant. There is no evidence that the ATF agents were aware of any threats made to the
14 Defendants by Mr. Beckworth. Nor does Defendant Patton’s testimony indicate that either he or
15 the other Defendants were actually fearful of Mr. Beckworth. The video evidence introduced
16 during the hearing shows Defendants Sangalang, Flores and Patton behaving in a casual,
17 cooperative, friendly, and sometimes joking manner with the undercover agents while engaging
18 in firearms or narcotics deals or discussing and planning the robberies. The totality of the
19 evidence presented during the hearing therefore does not support the conclusion that Defendants
20 were coerced into committing any of the charged crimes because they feared the undercover
21 agents or the informant Beckworth.

22 **2. Defendants’ Argument that the Indictments Should be Dismissed Because**
23 **Agent McCarthy Allegedly Used Illegal Drugs During the Undercover**
Operation

24 Defendants argue that the indictments should be dismissed because Agent McCarthy used
25 illegal drugs during the undercover operation. Defendants have also suggested that the agents’
26 frequent beer drinking or the fact that agents provided beer to the targets of the investigation,
27 some of whom were minors, warrants dismissal of the indictment. Even if the Court were to find
28 that these allegations are true, they do not support dismissal of the indictments.

1 The cases cited by Defendant do not support dismissal of the indictment based Agent
2 McCarthy's alleged drug use. In *United States v. Ramirez*, 710 F.2d 535, 540-41 (9th Cir. 1983),
3 the government prosecuted the defendant for his participation in a narcotics conspiracy which
4 defendant claimed he was authorized to engage in as an informant. The government argued,
5 however, that defendant violated his informant's agreement and that the crime he was charged
6 with was not part of his agreement. Although the court found some validity to defendant's
7 contentions, it held that the government's conduct did not rise to the level justifying dismissal
8 under the due process clause or the court's supervisory powers. In *United States v. Simpson*, 927
9 F.2d 1088 (9th Cir. 1991), the government used a drug-using prostitute as an informant. While
10 engaging in narcotics transactions with the defendant, the informant also engaged in repeated
11 sexual intercourse with him. The court held that this conduct did not warrant dismissal pursuant
12 to the court's supervisory powers. (The court had previously reversed dismissal of the indictment
13 based on the due process clause. See *United States v. Simpson*, 813 F.2d 1462 (9th Cir. 1987)).
14 In *United States v. Barrera-Moreno*, 951 F.2d 1089, 1092 (9th Cir. 1991), the court held that an
15 indictment should not have been dismissed because the informant used narcotics obtained from
16 the defendants and because the government failed to properly test him for drug use.

17 Although *Ramirez*, *Simpson* and *Barrera-Moreno* held that there were insufficient
18 grounds to dismiss the indictments, there was at least some evidence in those cases of a causal
19 relationship between the government's conduct and the defendants' criminal behavior. The
20 Court is not aware of any case which holds that an indictment should be dismissed because a
21 government agent engages in illegal drug use during an undercover operation, especially where
22 no showing is made that the agent's misconduct affected the defendants' behavior in committing
23 the charged offenses. There is simply no evidence in this case that Agent McCarthy's alleged
24 illegal drug use played any role in the alleged firearms or narcotics transactions or the robbery
25 conspiracy. Thus, even if it was proven that Agent McCarthy used illegal drugs, dismissal of the
26 indictments would not be justified on this ground.

27 Defendants have also not met their burden of proving that Agent McCarthy did, in fact,
28 use illegal drugs. During the hearing, Defendants played excerpts of video recordings produced

1 by the Government. *See 10/2/08 Hearing Transcript , Docket No. 190*, pages 36-49. In one
2 excerpt, Agent McCarthy removes a glass pipe from the desk drawer. Agent McCarthy has a cell
3 phone conversation in which he asks whether someone is on their way in. He looks out the rear
4 office window and then lights the pipe. Agent McCarthy blows several puffs out into the office
5 and puts the pipe in the desk drawer. Agent Gomez then enters the office. Agent McCarthy
6 again removes the pipe from the drawer and takes a couple of puffs. The Court cannot determine
7 what, if any, reaction Agent Gomez has to Agent McCarthy's use of the pipe. A few minutes
8 later, a male subject and a female enter the office. The audio is of very poor quality and the
9 Court cannot determine what is discussed. *Defendants' Exhibit "F"*.

10 Defendants claim that another excerpt, *Exhibit "G"*, shows Agent McCarthy telling the
11 informant Pedrasa not to smoke pot in the tattoo parlor and that he doesn't want the smell of
12 weed in the shop. Defendants argue that this statement is inconsistent with Agent McCarthy's
13 testimony that he smoked Wizard Weed so that the targets would smell the marijuana odor and
14 think he was using the drug. *10/2/08 Hearing Transcript , Docket No. 190*, page 41. Having
15 listened to the recording, however, the Court cannot make out any such statement by Agent
16 McCarthy. Agents McCarthy and Gomez testified that the gang members who hung out in the
17 tattoo parlor regularly smoked marijuana on the premises. While it is possible that Agent
18 McCarthy told Mr. Pedrasa not to smoke marijuana in the tattoo parlor, it seems unlikely that
19 Agent McCarthy would have told him that he did not want the smell of marijuana in the tattoo
20 parlor.

21 A third excerpt shows Agent McCarthy light the pipe and walk out of the office. *Exhibit*
22 *"H,"* at 1:38. Defendants also claim that *Exhibit "H,"* at 1:45, shows Agent McCarthy rolling a
23 dollar bill which he uses to snort a substance. The video shows Agent McCarthy remove a bill
24 from his pocket which he rolls and unrolls at least twice and then places to his nose and sniffs.
25 There is no indication, however, that Agent McCarthy placed any substance on the desk which he
26 sniffed through the rolled bill. As the video continues, he appears to pour a powdery substance
27 into the desk drawer, but then exits the room.

28 . . .

1 Agent McCarthy testified that Agent Gomez provided him with a small quantity of
2 Wizard Weed which he used in the early part of the undercover operation to make it appear to the
3 targets that he used illegal drugs. Agent McCarthy testified that Wizard Weed is a commercially
4 available herb that is sold over the Internet and through various magazines. It does not contain
5 THC. *12/19/08 Hearing Transcript, Docket No. 224*, pages 107-109. Agent McCarthy also
6 testified that he had a target, whom he characterized as an “unwitting informant,” purchase a
7 glass smoking pipe from a local head shop which he used to smoke the Wizard Weed. *1/05/09*
8 *Hearing Transcript, Docket No.*, pages 10-11. The purchase of this pipe was documented in an
9 expenditure voucher. *Id.* Agent McCarthy also testified that on one occasion he practiced
10 simulating the snorting of a fake controlled substance by rolling a dollar bill. He indicated that
11 his plan was to perform this simulation as one of the targets walked into the tattoo parlor office.
12 He stated, however, that he never carried out this ruse. *Id.*, pages 115, 224-225, 244. He also
13 testified that he had a non-prescription headache powder which he would have used to simulate
14 cocaine. *Id.*

15 Agent Gomez testified that he obtained the Wizard Weed during a training seminar on
16 undercover techniques presented by retired ATF Agent Charles Fuller. *1/26/09 Hearing*
17 *Transcript Docket No. 249*, page 56. Mr. Fuller testified that he discusses the use of Wizard
18 Weed as an undercover prop during his seminars. According to Mr. Fuller, Wizard Weed
19 simulates the appearance and smell of marijuana. He also sells quantities of Wizard Weed to law
20 enforcement officers who attend the seminars and gives free samples to ATF agents who attend.
21 Mr. Fuller testified that he gave Agent Gomez a small quantity of Wizard Weed during a seminar
22 in Las Vegas in October 2006. *12/19/08 Hearing Transcript, Docket No. 224*, pages 8-12. He
23 testified that Wizard Weed has been tested by the Honolulu Police Department which confirmed
24 that it does not contain THC. *Id.*, pages 40-41.

25 Defendants challenge the credibility of the agents’ and Mr. Fuller’s testimony. They note
26 that the agents did not obtain express approval from ATF management to use Wizard Weed in
27 the investigation. Nor was there any contemporaneous documentation that Agent Gomez
28 obtained the Wizard Weed from Mr. Fuller. There was no mention in the contemporaneous

1 investigation reports that Agent McCarthy was using Wizard Weed to simulate drug use. Agent
2 McCarthy testified that his use of Wizard Weed was “documented” because other ATF agents
3 could have observed it on the live video feed from the surveillance camera and because his use of
4 Wizard Weed is on recordings which were provided to the Defendants. Defendants suggest,
5 however, that these recordings were inadvertently preserved by the agents and turned over the
6 prosecutors who, in turn, were unaware of the recordings’ contents before they were produced to
7 Defendants.

8 Defendants also presented the testimony of Jennifer Chao regarding alleged drug use by
9 Agent McCarthy. *May 11, 2009 Hearing Transcript Vol. II, Docket No. 345*, pages 28- 32. Ms.
10 Chao’s boyfriend David Murphy is a defendant in another case arising out of the undercover
11 operation. Ms. Chao attended the hearing in this case and observed the testimony of Agent
12 McCarthy. According to Ms. Chao, she approached Defendants’ counsel after the hearing and
13 advised them that she had information regarding Agent McCarthy’s drug use. Ms. Chao testified
14 that she went to Hustler Tattoo with Mr. Murphy in April 2008 to talk to Richard Beckworth
15 about a tattoo. Ms. Chao stated that she walked into Hustler’s Tattoo with a marijuana “blunt,”
16 i.e., a cigar sized marijuana cigarette. She testified that after looking at tattoo artwork, she, Mr.
17 Murphy and Mr. Beckworth went outside and smoked the marijuana. After Murphy and
18 Beckworth went back inside the tattoo parlor, Agent McCarthy came out, observed her smoking
19 the marijuana and commented on its smell. Ms. Chao asked him if he wanted a hit. Agent
20 McCarthy said sure and took two “hits” on the blunt. The Government did not recall Agent
21 McCarthy to rebut Ms. Chao’s testimony. It presumably relies on Agent McCarthy’s denial that
22 he used illegal drugs during the undercover operation. While it is possible that Ms. Chao
23 testified truthfully, she has a motive to testify falsely to support her boyfriend’s defense.

24 The Court finds that Agent McCarthy’s testimony that he used Wizard Weed to simulate
25 drug use as part of his role playing in the undercover operation is credible and believable. His
26 testimony is also supported by Agent Gomez and Mr. Fuller. Clearly, the undercover agents and
27 their supervisors could and should have done a better job in documenting Agent McCarthy’s use
28 of Wizard Weed or other simulated drug use, if for no other reason than to preserve his

credibility as a trial witness. The evidence is insufficient, however, to justify the conclusion that Agent McCarthy used illegal drugs during the undercover operation.

3. Government's Alleged Failure to Preserve Potentially Exculpatory Audio/Video Evidence

Defendants also contend that the indictments should be dismissed because the ATF agents failed to preserve thousands of hours of video/audio recordings made at Hustler's Tattoo during the undercover operation, some of which allegedly contained evidence favorable to the Defendants. They also argue that the incidents may have been observed by the task force agents who were monitoring the live video feed and therefore the ATF was on some notice of its duty to preserve the recordings of those events.

The ATF equipped the interior of Hustler's Tattoo with three concealed video cameras. One of these cameras was located in the office where the narcotics and firearms transactions took place and where the meetings regarding the robbery conspiracy occurred. The other cameras were located in the "public area" of the tattoo parlor and provided coverage of the tattoo bays where Defendant Sangalang and the informant Beckworth worked as tattoo artists. Concealed microphones were also located in the office and other areas of the tattoo parlor. There were also cameras located on the exterior of the tattoo parlor. These cameras were monitored by other agents at a nearby location for purposes of protecting the agents when they were present at the tattoo parlor. The cameras and microphones were connected to a computer which allowed ATF agents and supervisors at remote locations to observe the activities inside the tattoo parlor on their personal computers. The recordings on the hard drive, however, were not preserved.

The ATF installed a cabinet in the rear of the tattoo parlor which contained three DVD recorders which were connected to the interior cameras and microphones. Only one microphone could be recorded at any given time, however, and the agents had to turn a switch inside the cabinet to select which microphone to record. The agents loaded DVD discs into the recorders each day prior to when they planned to be in the parlor. Because the cabinet was located in an area of the shop that was accessible to the targets, including Mr. Sangalang, the agents would have to load and remove DVDs when no one else was present or do so in a surreptitious manner.

1 The outside cameras were not connected to the DVD players.

2 After the agents conducted firearm or narcotics transactions or meetings about the
3 proposed stash house robberies, they would mark the DVDs on which the events were recorded
4 for identification and place the DVDs in the ATF's evidence vault. Those DVDs would also be
5 identified in the agents' reports of investigation. Agent Gomez testified that the agents preserved
6 DVDs which contained information of "evidentiary value," i.e., illegal firearms and narcotics
7 deals, and the meetings concerning the robbery conspiracy. He testified that the agents would
8 have preserved any DVDs that recorded matters favorable to the suspects or targets, but to his
9 knowledge there were none. He also testified that the agents did not attempt to review the hours
10 of recordings when no Government agents were present to determine if they contained something
11 of evidentiary value or information or evidence favorable to the suspects. Unless a DVD
12 contained something that the agents knew had evidentiary value, it was discarded.

13 Agents Gomez and McCarthy did not discuss the decision to discard the DVDs with their
14 ATF supervising agents or with the Assistant United States Attorney assigned to the
15 investigation. A 1989 ATF procedure order or manual states that all "electronic interception
16 evidence," which is defined as original tapes, logs, and transcripts, whether consensual or
17 nonconsensual, is be preserved, regardless of its perceived evidentiary value, until the case is
18 disposed of or the case is closed. *Defendants' Exhibit "EE."* ATF Supervising Agent Donald
19 York testified, however, that this procedure order is outdated, and the ATF does not require
20 agents to preserve electronic surveillance of the type involved in this case unless it has known
21 evidentiary or exculpatory value. *8/7/09 Hearing Transcript, Docket No. 373*, pages 125-26.

22 Defendant Patton testified that in December 2007, Richard Beckworth sawed off the
23 barrels and removed the serial numbers from some rifles at Defendant Sangalang's house. Mr.
24 Beckworth then asked Defendant Sangalang to take the sawed-off rifles to the tattoo parlor. Mr.
25 Patton drove Defendant Sangalang to the tattoo parlor where Sangalang sold the weapons to the
26 undercover agents in the tattoo parlor office. Mr. Beckworth went to the tattoo parlor in his own
27 vehicle. After Mr. Sangalang sold the sawed-off rifles to the undercover agents, he and Patton
28 went back into the tattoo parlor where Mr. Sangalang gave the proceeds of the sale to Mr.

1 Beckworth. *5/11/09 Hearing Transcript, Docket No. 244*, pages 7-9. (Mr. Patton did not testify
2 whether Mr. Beckworth supplied the firearms in other transactions that he or Defendants
3 Sangalang engaged in with the agents.) Mr. Patton testified that on other occasions, Mr.
4 Beckworth showed the Defendants firearms and different types of marijuana that he had inside
5 the tattoo parlor. *Id.*, page 10.

6 Defendants presented the testimony of Ashley Gonzalez to corroborate Mr. Patton's
7 testimony that Mr. Beckworth supplied the sawed-off rifle(s). Ms. Gonzalez testified that she
8 was introduced to Mr. Beckworth by her brother-in-law Paul Ashley who is a defendant in
9 another case arising out of the undercover operation. Ms. Gonzalez testified that in December of
10 2007, Mr. Beckworth asked her to go with him to a Big 5 sporting goods store to purchase a gun.
11 Mr. Beckworth gave Ms. Gonzalez the money to purchase the firearm which she then purchased
12 in her own name. She acknowledged that she signed a purchase form in which she represented
13 that she was purchasing the gun for herself. She then returned to Paul Ashley's house with Mr.
14 Beckworth who took possession of the gun. Mr. Beckworth told her that he intended to sell the
15 gun. *5/11/09 Hearing Transcript, Docket No. 244*, pages 18-23.

16 Defendant Patton also testified that the methamphetamine that he and Defendant
17 Sangalang sold to the agents was actually supplied by Mr. Beckworth. According to Mr. Patton,
18 Mr. Beckworth asked Sangalang and Patton to sell the drugs to the agents for him because they
19 would be able to get a better price than he could. *Id.*, pages 13-14. Mr. Patton also testified that
20 it was his understanding that the agents would tell Mr. Beckworth what amount of
21 methamphetamine they were seeking. Mr. Beckworth would then obtain the drug and provide it
22 to Defendants to deliver to the agents. *Id.* Mr. Patton testified that after Sangalang sold the
23 drugs to Agents McCarthy and Gomez, the agents would leave the tattoo parlor. Mr. Beckworth
24 would then arrive at the parlor and Mr. Sangalang would pay Mr. Beckworth the money that was
25 given to him by the agents. *Id.*, page 15.

26 Defendants argue that the money exchanges with Mr. Beckworth in the tattoo parlor were
27 recorded on the discarded DVDs. They also claim that the discarded DVDs would have verified
28 Mr. Beckworth's frequent use of marijuana in the tattoo parlor and Jennifer Chao's presence in

1 the tattoo parlor on the date that Agent McCarthy allegedly smoked from her marijuana blunt.
 2 They also suggest that the discarded videos may have shown additional occasions in which Agent
 3 McCarthy used illegal drugs. Because the Government did not preserve the videos, Defendants
 4 argue the indictments should be dismissed.

5 In *California v. Trombetta*, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984), the
 6 Supreme Court stated that the due process clause requires that criminal defendants be afforded a
 7 meaningful opportunity to present a complete defense, and that to safeguard that right, the Court
 8 had developed “what might loosely be called the area of constitutionally guaranteed access to
 9 evidence.” *Trombetta*, 104 S.Ct. at 2532, quoting *United States v. Valenzuela-Bernal*, 458 U.S.
 10 858, 867, 102 S.Ct. 3440, 3447, 73 L.Ed.2d 1193 (1982). As part of this requirement, the Court
 11 held that the government has some duty to preserve evidence favorable to the accused. The
 12 Court stated:

13 Whenever potentially exculpatory evidence is permanently lost,
 14 courts face the treacherous task of divining the import of materials
 15 whose contents are unknown and, very often, disputed. (citation
 16 omitted). Moreover fashioning remedies for the illegal destruction
 17 of evidence can pose troubling choices. In nondisclosure cases, a
 18 court can grant the defendant a new trial at which the previously
 suppressed evidence may be introduced. But where evidence has
 been destroyed in violation of the Constitution, the court must
 choose between barring further prosecution or suppressing – as the
 California Court of Appeals did in this case – the state’s most
 probative evidence.

19 *Trombetta*, 104 S.Ct. at 2533.

20 In reversing the state court’s order suppressing “Intoxilyzer” test results because the state
 21 failed to preserve the breath samples, the Court noted that the California authorities did not
 22 destroy the samples in a calculated effort to circumvent the disclosure requirements established
 23 by *Brady v. Maryland* and its progeny. The court also accepted that the officers were acting in
 24 good faith and in accord with their normal practice and there was no record or allegation of
 25 official animus toward the defendants or a conscious effort to suppress exculpatory evidence.

26 The Court further stated:

27 More importantly, California’s policy of not preserving breath
 28 samples is without constitutional defect. Whatever duty the
 Constitution imposes on the States to preserve evidence, that duty

1 must be limited to evidence which might be expected to play a
 2 significant role in the suspect's defense. To meet this standard of
 3 constitutional materiality, see *United States v. Agurs*, 427 U.S., at
 4 109-110, 96 S.Ct., at 2400, evidence must both possess an
 5 exculpatory value that was apparent before the evidence was
 destroyed, and be of such a nature that the defendant would be
 unable to obtain comparable evidence by other reasonably
 available means. Neither of these conditions is met on the facts of
 this case.

6 *Id.*, 104 S.Ct. at 2534.

7 In *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988), the
 8 defendant was convicted of child molestation, sexual assault and kidnaping. The defendant's
 9 conviction was based in part on the victim's eyewitness identification of him. The state failed to
 10 properly refrigerate the semen and blood samples found on the victim's clothing and the tests
 11 performed on the samples after they had deteriorated were inconclusive. Defendant's expert
 12 declined to conduct tests on the deteriorated samples. The Arizona Court of Appeals reversed
 13 the defendant's conviction on the grounds that timely tests on properly preserved samples might
 14 have exonerated the defendant. In reversing and reinstating defendant's conviction, the Supreme
 15 Court held that in addition to the two requirements of *Trombetta*, the defendant was also required
 16 to show that the state's failure to preserve the evidence was done in bad faith. *Id.*, 109 S.Ct. at
 17 337. The Court stated that the state's failure to refrigerate the samples was negligent at worst.

18 In *United States v. Cooper*, 983 F.2d 928, 931 (9th Cir. 1993), the court affirmed the
 19 dismissal of the indictment based on the government's failure to preserve potentially exculpatory
 20 evidence. In that case, the government alleged that defendants used a reaction vessel to
 21 manufacture methamphetamine. The defendants' attorney informed the government that the
 22 vessel was used to manufacture a legal substance and that the physical configuration of the vessel
 23 was not suitable for making methamphetamine. Despite being on notice of defendants' claim
 24 and request that the vessel be made available for their expert's inspection, the government
 25 allowed the vessel to be buried in a landfill. Pursuant to *Trombetta* and *Youngblood*, the Ninth
 26 Circuit held that to establish a constitutional due process violation based on the failure to
 27 preserve evidence, the defendant must show (1) that the unavailable evidence possessed
 28 exculpatory value that was apparent before the evidence was destroyed; (2) that defendant was

unable to obtain comparable evidence by other reasonably available means; and (3) that the government acted in bad faith in failing to preserve the evidence. *Cooper* noted that “[t]he presence or absence of bad faith turns on the government’s knowledge of the apparent exculpatory value of the evidence at the time it was lost or destroyed.” *Id.*, 983 F.2d at 931, citing *Youngblood*, 488 U.S. at 56-57 n. *, 109 S.Ct. at 336-337 n.*.

Cooper held that defendants satisfied all three elements to support dismissal. First, the government was on notice of the potential exculpatory value of the vessel before it was destroyed. Second, there was no available evidence, comparable to testimony by defendant’s expert after inspection, that the vessel was not suitable for making methamphetamine. Finally, the court held that the evidence supported a finding of bad faith because the government made no effort to preserve the vessel after being notified of its potential exculpatory value. The government also misrepresented to defendants that the equipment was being held as evidence even after it knew that it had probably been discarded. *Compare United States v. Curtin*, 443 F.3d 1084, 1094 (9th Cir. 2006) (the government’s alleged failure to preserve a surveillance video recording of defendant approaching an alleged victim did not require dismissal because defendant failed to show how the video would have been exculpatory).

The ATF agents’ conduct in discarding DVDs made during the undercover investigation can be fairly criticized. The agents were aware that the Defendants were present in the tattoo parlor when the agents were not there. They were also aware that the Defendants had contact with Mr. Beckworth, as well as other targets of the investigation, inside the tattoo parlor that the agents did not observe. It would not have required any great foresight for the agents to have recognized that the DVDs might contain relevant evidence that they were unaware of, including evidence that Defendants would later claim was favorable to their defense. There was also no apparent need to discard or destroy the DVDs. There is no evidence, for example, that the ATF lacked the capacity to store all of the DVDs until the case was concluded. The agents’ decision to discard or destroy the DVDs is also inconsistent with the 1989 ATF procedure order which states that surveillance evidence should be retained until the case is disposed of or closed.

Defendants’ Exhibit “EE.” Although Agent York testified that the ATF no longer follows that

1 order, he provided no clear explanation as why it is no longer followed.

2 Under *Trombetta* and *Youngblood*, however, the government's obligation to preserve
3 evidence is limited to evidence whose exculpatory value was apparent to the government before
4 it was destroyed. There is no evidence that Agents McCarthy, Gomez or the other agents
5 involved in the investigation, were aware that Defendant Sangalang delivered the firearm or drug
6 sales proceeds to Mr. Beckworth inside the tattoo parlor. (Defendants have argued, however, that
7 these transactions could have been observed by other agents who were monitoring the live video
8 feed.) Accordingly, Defendants have not met the first requirement of the *Trombetta*. Because
9 bad faith turns on the government's knowledge of the apparent exculpatory value of the evidence
10 at the time it was lost or destroyed, *Cooper*, 983 F.2d at 931, Defendants also cannot satisfy the
11 bad faith requirement of the test.

12 The Court is also not persuaded that the alleged transactions between Defendants
13 Sangalang and Patton and Mr. Beckworth are significantly favorable to the defense such that
14 dismissal of the indictments would be appropriate if the other elements of the *Trombetta* test
15 were met. Agent Gomez testified that the firearms transactions with Defendants Sangalang and
16 Patton were arranged by Mr. Beckworth. Presumably, Mr. Beckworth received some share of the
17 firearms sales proceeds from Defendants based on his role in setting up the transactions.
18 Assuming that the agents had observed Mr. Sangalang make a payment to Mr. Beckworth in the
19 tattoo parlor following the firearms transaction, this would not necessarily have indicated to the
20 agents that Mr. Beckworth actually supplied the guns. Neither agent was questioned about this
21 during the hearing. Defendants also elected not to call Mr. Beckworth as a witness to question
22 him about his involvement in the firearms or narcotics transactions. It is possible that Mr.
23 Beckworth will confirm that he received some payment from Defendants. Therefore, Defendants
24 have also not shown that they are unable to obtain comparable evidence by other reasonably
25 available means.

26 The Defendants have a slightly better argument concerning the alleged payments to Mr.
27 Beckworth following the narcotics transactions. Agent Gomez testified that to his knowledge
28 Mr. Beckworth was not involved in the narcotics transactions between Defendants Sangalang and

1 Patton and the agents. Evidence that Mr. Beckworth received payments from Mr. Sangalang
2 shortly after the drug sales occurred, would indicate that Mr. Beckworth was involved in the
3 narcotics transactions -- contrary to what Agent Gomez believes. Defendant Patton also testified,
4 however, that he and Sangalang voluntarily sold the drugs to the agents so that Mr. Beckworth
5 could get a better price from them.⁴ The exculpatory value of the alleged evidence is therefore
6 questionable. Defendants' weak entrapment theory based on Mr. Beckworth having allegedly
7 supplied the methamphetamine does not justify dismissal of the indictments. In any event, there
8 is no evidence that the agents were aware of the payments prior to discarding the videos.

9 Finally, Agents McCarthy and Gomez both testified that Mr. Beckworth smoked
10 marijuana in the tattoo parlor on several occasions in violation of his informant's agreement.
11 The possibility that video recordings would have confirmed this or have shown additional
12 instances in which Mr. Beckworth smoked marijuana does not warrant dismissal based on
13 the agents' failure to preserve the video recordings. There is also no evidence that the Government
14 disputes that witness Jennifer Chao was in the tattoo parlor in or about April 2008 as she
15 claimed. The possibility that video recordings would have confirmed her presence inside the
16 tattoo parlor does not constitute proof that Agent McCarthy smoked marijuana on that occasion
17 as she testified.

CONCLUSION

19 Based on the foregoing, the Court concludes that Defendants have failed to meet their
20 burden to support dismissal of the indictments based on outrageous government conduct under
21 the due process clause or pursuant to the Court's supervisory powers. Accordingly,

RECOMMENDATION

23 **IT IS RECOMMENDED** that Defendant's Motion to Dismiss for Outrageous
24 Government Conduct (#104) be **denied**.

25 ...

27 ⁴Agent Gomez testified that Sangalang and Patton made repeated attempts to get the
28 agents to purchase narcotics from them and that Defendant Sangalang told the agents that he had
sources of narcotics supply in Hawaii and Georgia.

NOTICE

Pursuant to Local Rule IB 3-2, any objection to this Finding and Recommendation must be in writing and filed with the Clerk of the Court within ten (10) days. The Supreme Court has held that the courts of appeal may determine that an appeal has been waived due to the failure to file objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985). This circuit has also held that (1) failure to file objections within the specified time and (2) failure to properly address and brief the objectionable issues waives the right to appeal the District Court's order and/or appeal factual issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

DATED this 28th day of October, 2009.

George Foley Jr.
GEORGE FOLEY, JR.
United States Magistrate Judge